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NO.

in the Supreme Court of the United States

RUSSELL HOBSON

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

Whether petitioner was improperly denied his constitutional right to counsel of his choice by the disqualification of his trial counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above-styled cause on February 20, 1982, with written opinion filed on March 24, 1982, and rehearing en banc denied May 12, 1982.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is printed at ____F.2d ____, and is printed in the Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 20, 1982, with the written opinion following on March 24, 1982. En banc rehearing was denied May 12, 1982. The jurisdiction of this court is invoked under 28 U.S.C. §1254.

Petitioner submits this issue is ripe for review inasmuch as this is an issue that could continue to occur but always be capable of evading review. *Roe v. Wade*, 410 US 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973).

STATEMENT OF THE CASE

Petitioner was charged, along with co-defendants, with various drug related offenses. Subsequently, Petitioner's chosen attorney was disqualified from the representation of Petitioner on such charges. The disqualification of Petitioner's chosen attorney was affirmed by the United States Court of Appeals, Eleventh Circuit, on February 20, 1982 and the opinion was later filed on March 24, 1982. Rehearing en banc was denied on May 12, 1982. This Petition for Writ of Certiorari in the United States Supreme Court follows.

STATEMENT OF THE FACTS

Petitioner was charged, along with co-defendants, with various drug related offenses. Eight weeks before trial on such charges, Petitioner's counsel of choice was disqualified. The disqualification of counsel was affirmed by the United States Court of Appeals, Eleventh Circuit, on February 20, 1982 by a 2-1 decision and the opinion, including the dissenting opinion, followed on March 24, 1982. The following findings of facts were made by the panel:

The disqualification of Petitioner's chosen counsel was based upon affidavits of two government witnesses, Robinson and Alexander. The affidavit of Robinson reflects that he met Alexander in the office of Petitioner's counsel while he was at such office to discuss pending litigation in which the attorney was representing him. Both affidavits purport to show that a future marijuana shipment was discussed between the two affiants during such meeting and Alexander's affidavit suggests that it was his opinion that the attorney had knowledge of the context of their discussion. The marijuana shipment referred to was alleged in the indictment to have been one in which Petitioner was a co-conspirator.

The dissenting opinion recognized that both Robinson and Alexander were convicted felons and that Robinson's affidavit conflicted with his grand jury testimony. The dissenting opinion also recognized that the affidavits conflicted as to the time at which the meeting in the attorney's office occurred. Moreover, it was pointed out by the dissent that the attorney was concededly not a target of a government investigation nor would he be called as a

witness to testify against his client, Petitioner. Furthermore, the dissent noted that the evidence against the attorney was given ex parte and that no hearing was held to test the accuracy of such evidence.

On the basis of the affidavits, however, the majority affirmed the disqualification of Petitioner's counsel on the grounds that a possibility of the appearance of impropriety was created and that such testimony regarding Petitioner's counsel could be detrimental to Petitioner. The majority recognized that Petitioner was willing to waive any problems created by the affidavits in order to have the benefit of his attorney's continued representation.

ARGUMENT

PETITIONER WAS IMPROPERLY DENIED HIS CONSTITUTIONAL RIGHT TO COUNSEL OF HIS CHOICE BY THE DISQUALIFICATION OF COUNSEL.

The Sixth Amendment of the United States Constitution has long been interpreted by this Court to afford a criminal defendant the right to counsel of one's choice. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Concededly, this right is not absolute, but, as recognized by the dissenting opinion of the court below, such right is compelling. *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975). In deciding the case at bar, the Eleventh Circuit sought guidance from this Court due to the absence of authority within that circuit.

The court below found a split of authority within its predecessor, the former Fifth Circuit, as to the standard of review to be applied in appeals from disqualification orders. However, the court below noted the absence of Supreme Court authority on this issue. Moreover, the instant case was ultimately resolved without any guidance from this Court as to the standard of review to be applied in such appeals or the weight to be accorded a defendant's right to choice of counsel against bare and conflicting allegations of impropriety of counsel.

Clearly, the constitutional right to counsel of one's choice is an issue of such importance to merit this Court's attention and resolution of the weight to be granted to such choice in disqualification decisions.

In *Woods v. Covington County Bank*, 537 F.2d 804

(5th Cir. 1976), the Court enunciated a two-prong test for determining whether an attorney may be disqualified on the ground of the appearance of impropriety in violation of Canon 9 of the Code of Professional Responsibility. The *Woods* court established that in order for an attorney to be disqualified under the appearance of impropriety, first, "there must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur." *Id.* at 813. Second, "a court must also find that the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." *Id.* at 813, n. 12. "An attorney should be disqualified only when both of [the above] standards have been satisfied." *Id.*

Furthermore, the *Woods* court recognized that an overly broad application of Canon 9 would ultimately be self-defeating. *Id.* at 813. The court reasoned that under a broad application, a litigant would often be unfairly denied the counsel of his choice and stated:

> Indeed, the more frequently a litigant is delayed or otherwise disadvantaged by the unnecessary disqualification of his lawyer under the appearance of impropriety doctrine, the greater the likelihood of public suspicion of both the bar and the judiciary. *Id.*

Petition submits that disqualification in this instant was an overly broad application of the appearance of impropriety doctrine and, as noted by the dissent, "a thorough examination of the 'balance' reached indicates a serious abrogation of the defendant's constitutional rights".

In responding to the dissent filed by Judge Kravitch in this case, the majority reasoned that Petitioner's right to counsel of choice was only partially affected by the disqualification as Petitioner was represented by two attorneys prior to disqualification. Petitioner submits that the record clearly reveals that the attorney disqualified was the counsel chosen for representation on the charges against him and that Petitioner considered the second attorney as a "personal advisor" rather than trial counsel.

Moreover, Petitioner submits that disqualification of counsel in the instant case did nothing to protect the public's confidence in the legal profession. The testimony regarding the alleged meeting in Petitioner's attorney's office would have been given whether the disqualified attorney was representing Petitioner or not. Surely members of the jury and the public generally are able to evaluate testimony in light of all the circumstances. The most obvious question raised by such testimony as given in the two affidavits is whether any of it is credible. The jury was ultimately asked to resolve that issue anyway. Apparently, neither the government nor the grand jury found such testimony credible inasmuch as no charges were brought against the disqualified attorney nor was he the target of any investigation. Moreover, the testimony regarding the attorney was irrelevant as he was not on trial. Thus, there was no need to rebut the testimony.

The courts in *Woods, supra* and other cases involving disqualification under the appearance of impropriety doctrine have revolved around whether it "appeared" that another ethical canon may be violated. See *United States v. Kitchen*, 592 F.2d 900 (5th Cir. 1979); *Hull v. Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975); *Davis v. Stamler*,

650 F.2d 477 (3d Cir. 1981); *In Re Taylor*, 567 F.2d 1183 (2d Cir. 1977); *In Re Corrugated Container Anti-Trust Litigation*, 659 F.2d 1341 (5th Cir. 1981).

In the case at bar, however, the Eleventh Circuit chose a novel approach to disqualification of Petitioner's attorney and applied the appearance of impropriety doctrine without reliance on the "appearance" of any other violation of ethical standards. In effect, the court determined that there was reason to believe that Petitioner's attorney may have acted improperly and that such reason outweighed Petitioner's constitutional right to choice of counsel. On this point, Petitioner adopts the reasoning of the dissent wherein it was stated,

> [I]f the meager evidence presented here supports the 'drastic action' of disqualification and consequent limitations of the constitutional rights to counsel of one's choice, I find it difficult to envision under what circumstances the social interests of an attorney's continued representation will outweight the risk of suspicion presented by an asserted conflict. *App. 8*

Certainly, such balancing of the right to choose one's counsel against the public's perception of an attorney is of great importance and thus, deserving of resolution by this Court. Under the holding of the court below, it becomes increasingly difficult to imagine any situation where any bare, unsupported and untested allegations against an attorney would not mandate disqualification.

Furthermore, it was inherent in the opinion of the court below and the trial court's order of disqualification that the "asserted conflict," referred to by the dissent,

was also a basis for disqualification. The logical development of the asserted conflict found to exist between Petitioner and his chosen counsel is hopelessly circuitous. On the one hand, it appears that the courts below reasoned that the "appearance of impropriety" of Petitioner's counsel would detrimentally affect Petitioner, thus creating a conflict between Petitioner and his attorney. On the other hand, it seems as though the court reasoned that the apparent conflict between Petitioner and his attorney would create the "appearance of impropriety." Regardless of the approach, a combination of the two arguments or a betwixt and between basis of a conflict, the ultimate decision is whether Petitioner may receive sound legal advice from his chosen attorney. This decision rests squarely on whether the attorney is able to exercise independent professional judgment on behalf of the client, in this case, Russell Hobson, as required by Canon 5.

The adjudication of this type conflict rests with the client upon full disclosure of its underlying basis. *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975); *In Re Taylor*, 567 F.2d 1183 (2d Cir. 1977).

After full disclosure of the type conflict presented here, the client is then free to waive the conflict and proceed with representation as originally chosen. *Id.* The *Taylor* court reasoned that once the court is satisfied that such waiver is knowingly and intelligently made, "it [the court] is without power unilaterally to obstruct the choice of counsel." *Id.* at 1191. Petitioner clearly waived any conflict created between himself and his chosen counsel. Therefore, the opinion of the court below is in total conflict with prior decisions of United States Courts of Appeal, Fifth Circuit and Second Circuit. Indeed, the court in *In Re*

Corrugated Container Anti-Trust Litigation, 659 F.2d 1341, 1349 (5th Cir. 1981) stated that:

> There may be come situations where the client has so clearly consented that disqualification would raise more public suspicion than it would quell.

Petitioner submits that the disqualification in this case is the type of situation envisioned by the court when the above statement was made.

In this case, the unique experiences of Russell Hobson's chosen trial counsel in trying many of the underlying cases to this case, including extensive cross-examination of key government witnesses, etc. was totally obviated by the disqualification of this particular attorney . . . to the direct detriment of Petitioner in violation of his fundamental Sixth Amendment right to counsel of choice.

CONCLUSION

For the above and foregoing reasons and authorities cited herein, it is respectfully requested that this Honorable Court grant its Writ of Certiorari and enter its order quashing the decision hereby sought to be reviewed and grant such other and further relief as seems right and appropriate to this court, including a new trial.

Respectfully submitted,

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Russell HOBSON, Defendant-Appellant.

No. 82-5138.

United States Court of Appeals,
Eleventh Circuit.

March 24, 1982.

Defendant appealed from order of the United States District Court for the Northern District of Florida, Lynn C. Higby, J., disqualifying one of his attorneys from representing him in drug trafficking prosecution. The Court of Appeals held that: (1) likelihood of public suspicion arising from expected testimony that the attorney was aware of the marijuana smuggling scheme outweighed defendant's interest in being represented by the attorney, and (2) defendant was not free to waive any ethical problems in order to have benefit of his attorney's continued representation because the ethical violation involved the public perception of the attorney and legal system rather than some difficulty in the attorney's effective representation of defendant.

Affirmed.

Kravitch, Circuit Judge, concurred in part and dissented in part and filed opinion.

1. Federal Courts—585

A district court order disqualifying counsel is an appealable "final order." 28 U.S.C.A. § 1291.

2. Criminal Law—641.1

A defendant's Sixth Amendment right to counsel should be deprived only where such drastic action is necessary to further some overriding social or ethical interests. U.S.C.A.Const.Amend. 6.

3. Criminal Law—1158(2)

In reviewing challenged attorney disqualification orders in criminal cases, Court of Appeals applies "clearly erroneous" test to issues of fact while carefully examining a district judge's application of relevant ethical standards.

4. Criminal Law—641.10(2)

For disqualification of an attorney under Canon 9 of the Florida Code of Professional Responsibility in a criminal action, there need not be proof of actual wrongdoing; there must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur, and a court must also find that likelihood of public suspicion or obloquy outweighs social interest which will be served by a lawyer's continued participation in a particular case. West's F.S.A. Code of Prof.Resp., Canon 9.

5. Criminal Law—641.10(1)

A criminal defendant's right to counsel of choice is not absolute and must give way where its vindication

would create a serious risk of undermining public confidence in integrity of legal system. U.S.C.A.Const.Amend. 6.

6. Criminal Law—641.10(2)

Expectations that witnesses' testimony would portray defendant's attorney as having engaged in thoroughly improper and unethical conduct due to his knowledge of marijuana smuggling operation for which defendant was being tried and thus impugn severely attorney's integrity and credibility in eyes of jury outweighed defendant's interest in being represented by the attorney and warranted disqualification. U.S.C.A.Const.Amend. 6; West's F.S.A. Code of Prof.Resp., Canon 9.

7. Criminal Law—641.10(2)

Defendant, whose attorney was disqualified from representing him, was not free to waive any ethical problems in order to have benefits of his attorney's continued representation because ethical violations involved public perception of the attorney and legal system rather than some difficulty in attorney's effective representation of defendant. U.S.C.A.Const.Amend. 6; West's F.S.A. Code of Prof. Resp., Canon 9.

Appeal from the United States District Court for the Northern District of Florida.

Before RONEY, KRAVITCH and CLARK, Circuit Judges.

PER CURIAM:

The defendant Hobson appeals from an order of the district court that disqualifies one of his attorneys from representing him in his trial scheduled to begin on March 8, 1982. Hobson is charged with violating federal laws pertaining to drug trafficking. Hobson moved that this appeal be expedited, that proceedings in the district court be stayed pending appeal, and requested oral argument. We granted the motion to expedite and the request for oral argument, but denied the motion to stay the proceedings in the district court pending appeal. We now affirm the order of the district court.

The trial court's disqualification order dated January 20, 1982, is based factually upon affidavits of two witnesses, Robinson and Alexander, whom the government represents will testify in Hobson's upcoming trial. The affidavit of Robinson states that, while he was at Hobson's attorney's office for a conference with respect to a pending case that the attorney was handling for Robinson, he "discussed with [the attorney] about [the attorney] getting in touch with Tom Alexander for the purpose of getting me work unloading marijuana. [The attorney] indicated that he would contact Alexander." The affidavit further states that, during Robinson's conversation with the attorney, Alexander came to the attorney's office.

The affidavits of Robinson and Alexander both reflect that while in the attorney's office they discussed the possibility that Robinson might assist in off-loading marijuana from a Constellation airplane in the near future. Both affidavits indicate that the attorney was in and out of his office while Robinson and Alexander discussed this future

unloading, and Alexander's affidavit indicates that he is reasonably sure that the attorney had full knowledge of the context of this conversation. Alexander further states in his affidavit that Robinson and he were talking about a Constellation aircraft that was later apprehended at the Panama City airport in February 1979. A review of the indictment in this case discloses that defendant Hobson is alleged to have been one of the co-conspirators in the commission of this unlawful importation of marijuana, for which Hobson had paid one and a half million dollars.

The district court concluded that in the trial scheduled March 8, 1982, in which Hobson is one of the defendants, evidence of Hobson's attorney's alleged knowledge of some of the criminal activity that is the subject matter of this criminal case may be offered and, if so, would create a reasonable possibility of an appearance of an impropriety on the attorney's part. Further, the district court found that such evidence would bring before the jury an issue of the attorney's credibility which would operate to Hobson's detriment. Therefore, the district court disqualified the attorney from representing Hobson, relying upon Canon 9 of Florida's Code of Professional Responsibility, which has been adopted by the Northern District of Florida in its Rule 5(F). Hobson then brought this interlocutory appeal from the disqualification order.

[1] A district court order disqualifying counsel is a "final order" appealable under 28 U.S.C. § 1291. *Cossette v. Country Style Donuts, Inc.*, 647 F.2d 526, 529 n.2 (5th Cir. 1981); *Woods v. Covington County Bank*, 537 F.2d 804, 809 (5th Cir. 1976). The standard of review to be applied in such appeals, however, is unclear. Finding that no Eleventh Circuit case has addressed this standard of review issue, we sought guidance from the cases of our

predecessor, the former Fifth Circuit. Examination of the Fifth Circuit cases, however, revealed no consistent line of authority. Instead, we found support for two distinct approaches to the standard of review issue.

In *In re Gopman*, 531 F.2d 262 (5th Cir. 1976), the court held that an order disqualifying counsel could be reversed only upon a showing of "abuse of discretion" by the district court. The court reasoned that disqualification orders are issued pursuant to the district court's inherent authority to take measures against unethical conduct occurring in connection with proceedings before it, and that this supervisory authority may be exercised within the sound discretion of the district court. *Id.* at 266.

One month after *Gopman* was decided, another panel of the Fifth Circuit decided *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir. 1976). In *Woods*, the court acknowledged that some courts had applied the "abuse of discretion" standard in reviewing disqualification orders, citing several cases including *Gopman*. 537 F.2d at 810 & n.7. The court noted, however, that "serious reservations" had been expressed by courts "about whether the scope of appellate review is limited to a finding of abuse of discretion in disqualification cases where only a purely legal question is at issue." 537 F.2d at 810. The court then declared:

> In disqualification cases such as this, where the facts are not in dispute, District Courts enjoy no particular functional advantage over appellate courts in their formulation and application of ethical norms. Thus, in this circuit, we have reviewed disqualification cases as we would most other appeals of a judge's findings, applying the

"clearly erroneous" test to issues of fact while carefully examining a District Judge's application of relevant ethical standards. *See, e.g. American Can Co. v. Citrus Feed Co.*, 5 Cir. 1971, 436 F.2d 1125 (disqualification order reversed because contrary to controlling ethical principles); *Uniweld Products, Inc. v. Union Carbide Corp.*, 5 Cir. 1967, 385 F.2d 992, *cert. denied*, 390 U.S. 921, 88 S.Ct. 853, 19 L.Ed.2d 980 (1968) (refusal to disqualify upheld because factual determination not clearly erroneous). Consequently, we are empowered in this case to determine whether the District Court's disqualification order was predicated upon a proper understanding of applicable ethical principles.

537 F.2d at 810.

This conflict has resurfaced recently. In *Brennan's Inc. v. Brennan's Restaurants, Inc.*, 590 F.2d 168 (5th Cir. 1979), the court adopted the *Woods* standard. *Id.* at 171. Just one year later, in *United States v. Salinas*, 618 F.2d 1092, 1093 (5th Cir.), *cert. denied*, 449 U.S. 961, 101 S.Ct. 374, 66 L.Ed.2d 228 (1980), the court followed *Gopman* and applied the "abuse of discretion" standard. Only several months ago, however, the court decided *Cossette v. Country Style Donuts, Inc.*, 647 F.2d 526, 530 (5th Cir. 1981), in which the *Woods* approach once again was followed.

We thus are faced with conflicting authority within the body of precedent by which we are bound. When confronted with conflicting precedent, we ordinarily reject the precedent that is inconsistent with either Supreme

Court cases or the weight of authority within the circuit. *Gresham Park Community Organization v. Howell*, 652 F.2d 1227, 1235 (5th Cir. 1981). This approach is not helpful here, however, because we are aware of no Supreme Court authority on the issue and there is no clear weight of authority within the circuit. Therefore, we must resort to common sense and reason to determine the appropriate standard of review in this case.

[2, 3] We believe that in criminal cases, where the defendant's sixth amendment right to counsel is implicated, the conflict in our prior cases should be resolved in favor of the accused. The "abuse of discretion" standard is simply too deferential where such a fundamental constitutional right is affected. Although we recognize that the criminal defendant's right to *particular* counsel is not absolute, *see, e.g., United States v. Silva*, 611 F.2d 78, 79 (5th Cir. 1980); *United States v. Kitchin*, 592 F.2d 900, 903 (5th Cir.), *cert. denied*, 444 U.S. 843, 100 S.Ct. 86, 62 L.Ed.2d 56 (1979); *Gandy v. State of Alabama*, 569 F.2d 1318, 1321 (5th Cir. 1978); *United States v. Dinitz*, 538 F.2d 1214, 1219 (5th Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1104, 97 S.Ct. 1133, 51 L.Ed.2d 556 (1977), the right should be deprived only where such drastic action is necessary to further some overriding social or ethical interest. We find the *Woods* approach more appropriate in the criminal context because it provides a higher degree of protection for this right. Thus, we choose to review the challenged disqualification order as we would most other final orders of a district court, "applying the 'clearly erroneous' test to issues of fact while carefully examining a District Judge's application of relevant ethical standards." *Woods*, 537 F.2d at 810.

The findings of fact upon which the disqualification order was based are not clearly erroneous. Thus, we must examine the ethical standard, Canon 9, which the district court applied.

Canon 9 provides: "A lawyer should avoid even the appearance of professional impropriety." The purpose of Canon 9 is to preserve public confidence in the bar and in the legal process. This confidence "may be eroded by irresponsible or improper conduct of a lawyer." A.B.A. Code of Professional Responsibility EC 9-2. Because some conduct that is ethical in fact may be perceived by laypersons as unethical, members of the bar are held by Canon 9 to a standard that prohibits not only actual impropriety, but conduct that may simply appear to be improper. Thus, attorneys have been disqualified under the appearance of impropriety doctrine even where there was no evidence of actual wrongdoing. *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976) (citing *General Motors Corp. v. City of New York*, 501 F.2d 639, 641 (2d Cir. 1974); *United States v. Trafficante*, 328 F.2d 117, 120 (5th Cir. 1964)).

[4] In *Woods v. Covington County Bank, supra*, the court set forth a two-prong test for disqualification of an attorney under Canon 9. First, although there need not be proof of actual wrongdoing, "there must be at least a reasonable possibility that some specifically identifiable impropriety did in fact occur." 537 F.2d at 813. Second, "a court must also find that the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." *Id.* at 813 n.12. "Under Canon 9, an attorney should be disqualified only when both of these standards have been satisfied." *Id.*

Applying this standard to the facts of this case, we find that the first prong is easily satisfied. The affidavits of Robinson and Alexander describe "specifically identifiable impropriety" on the part of Hobson's attorney and establish a "reasonable possibility" that the impropriety occurred. Even though the allegations may be false, such evidence at the trial would nevertheless create the possibility in the minds of the jurors.

[5] To apply the second prong of the test, we must balance the likelihood of public suspicion against the social interests served by the attorney's continued representation. This task becomes especially difficult in criminal cases, for the interest in permitting a criminal defendant to retain counsel of his choice is strong and deserves great respect. The right to counsel of choice is not absolute, however, and must give way where its vindication would create a serious risk of undermining public confidence in the integrity of our legal system.

[6] After serious reflection on the circumstances of this case, we conclude that the likelihood of public suspicion outweighs Hobson's interest in being represented by the attorney in question. The two affiants, Robinson and Alexander, will be called at trial as government witnesses. While one cannot predict with certainty what evidence will be offered, it is reasonable to expect that they will testify as to the same allegations made in their affidavits. This testimony will portray Hobson's attorney as having engaged in thoroughly improper and unethical conduct and thus will impugn severely his integrity and credibility in the eyes of the jury. Moreover, at that point, the ordinary person would perceive the specifically identifiable impropriety in the attorney's continued representation of a

co-defendant in a case where trial testimony makes the attorney a fact witness whether he chose to testify or not. Although the allegations in the affidavits may be untrue in fact, once the testimony is heard by the jury the damage will have been done—such testimony very likely could result in erosion of public confidence in the integrity of the bar and of the legal system, and this erosion is precisely what Canon 9 is designed to prevent.

[7] We are aware that Hobson has indicated that he would be willing to waive any ethical problems in order to have the benefit of his attorney's continued representation in this case. The defendant is not free to waive the problem presented here, however, because the ethical violation involves public perception of the lawyer and the legal system rather than some difficulty in the attorney's effective representation of Hobson. A defendant also cannot waive the impropriety of his lawyer's testifying in his favor at the trial if it should be determined that such testimony would be desirable for his defense. Under the facts of this case, Hobson's desire to be represented by particular counsel must yield to the need to protect the public's confidence in our system of justice.

For the reasons expressed in this opinion, the order of the district court disqualifying Hobson's attorney is affirmed.*

*The dissent asserts that our decision amounts to "a serious abrogation of the defendant's constitutional rights." We view this as an overstatement for two reasons. First, although the dissent states that the sixth amendment "has been interpreted to afford an accused the constitutional right to counsel of one's choice," every case cited in support of this proposition makes clear that the right to counsel of choice is not absolute. *See Powell v. Alabama*, 287 U.S. 45, 53, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932) (defendant entitled to *fair*

AFFIRMED.

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opportunity to secure counsel of choice); *United States v. Kitchin*, 592 F.2d 900, 903 (5th Cir.), *cert. denied*, 444 U.S. 843, 100 S.Ct. 86, 62 L.Ed.2d 56 (1979) ("A defendant's right to counsel of choice is not absolute and must yield to the higher interest of the effective administration of the courts."); *Gandy v. Alabama*, 569 F.2d 1318, 1323 (5th Cir. 1978) ("it is a settled principle that the right to counsel of one's choice is not absolute as is the right to the assistance of counsel"); *United States v. Dinitz*, 538 F.2d 1214, 1219 (5th Cir. 1976) (en banc), *cert. denied*, 429 U.S. 1104, 97 S.Ct. 1133, 51 L.Ed.2d 556 (1977) (right to counsel of choice is limited to some extent). Second, the dissent does not mention the fact that defendant Hobson was being represented by *two* attorneys of his choice prior to the disqualification of the attorney involved in this case. Our affirmance of the disqualification order in no way deprives Hobson of the continued representation of this other attorney. Thus, in any event, Hobson's right to counsel of choice is only partially affected by our decision. This fact notwithstanding, however, the only absolute constitutional right involved in this case is the sixth amendment guarantee of the defendant's right to representation by counsel, and our decision does not "abrogate" this right by any stretch of the imagination.

The dissent also questions whether the testimony in the affidavits would impugn the integrity and credibility of Hobson's attorney in the eyes of the jury. This doubt is based on the perceived likelihood that "rather damaging impeaching material . . . undoubtedly would be used to rebut the testimony. . . ." We believe that this approach misses the point. It may well be true that the testimony in the affidavits is completely false. Nevertheless, the allegations, regardless of their truth or falsity, will bring the attorney's integrity and credibility into question. The issue is not whether the attorney's impropriety will be *proven* in the eyes of the jury, but rather whether the allegations will engender public suspicion with regard to possible impropriety. We believe that where, as here, the allegations against the attorney are not inherently or facially incredible, the fact that such allegations may be rebutted does not remove the likelihood that public suspicion may result.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

While I fully agree with the majority as to the standard of review applicable to this case and also agree that the trial judge's findings of fact are not "clearly erroneous," I cannot concur in the legal conclusions reached by the trial court and affirmed by the majority.[1]

As the majority notes, disqualification based on an "appearance of impropriety" requires a careful balancing of the likelihood of public suspicion against the social interests served by the attorney's continued representation according to the facts of each case. In a criminal case, however, the "social interests" aspect of the balance is given an added dimension by the sixth amendment, which has been interpreted to afford an accused the constitutional right to counsel of one's choice. *E.g., Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *United States v. Kitchin*, 592 F.2d 900, 903 (5th Cir.), *cert. denied*, 444 U.S. 843, 100 S.Ct. 86, 62 L.Ed.2d 56 (1979); *Gandy v. Alabama*, 569 F.2d 1318, 1323 (5th Cir. 1978); *United States v. Dinitz*, 538 F.2d 1214, 1219 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104, 97 S.Ct. 1133, 51 L.Ed.2d 556 (1977). Here, while the majority purports to give the defendant the "benefit of doubt," a thorough examination of the "balance" reached indicates a serious abrogation of the defendant's constitutional rights. On the one hand, the likelihood of public suspicion is hardly as dra-

[1]Although the trial court's findings of fact are binding because they are not clearly erroneous his legal conclusions, including the application of the *Woods* balancing test, are subject to an independent determination on appeal. *E.g. United States v. Kreczmer*, 636 F.2d 108, 110 (5th Cir. 1981).

matic as the majority implies. Although the trial court found that the subject matter of the affidavits of Robinson and Alexander, when placed before the jury,[3] would create a suspicion that the attorney involved was compromising his client's interest, the facts showed (and the trial judge stated in his order) that both Robinson and Alexander were convicted felons and that Robinson's affidavit contradicted his grand jury testimony. Moreover, as appellant points out, the affidavits themselves conflicted as to the time at which the meetings concerning marijuana offloading occurred. Given this rather damaging impeaching material which undoubtedly would be used to rebut the testimony of Robinson and Alexander, I question whether their testimony will "impugn severely" the integrity and credibility of the attorney in the eyes of the jury.[4] As a result, this case is substantially different from cases in which the attorney is a target of an investigation, *United States v. Salinas*, 618 F.2d 1092 (5th Cir.), *cert. denied*, 449 U.S. 961, 101 S.Ct. 374, 66 L.Ed.2d 228 (1980), is representing multiple clients with conflicting interests, or in which the attorney will be called to testify against his

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[3]Because the incident reported in the Alexander and Robinson affidavits related to the indictment in this case, the trial court found that the information in the affidavits would likely reach the jury through the testimony of either or both men.

[4]I would also note that the evidence against the attorney was given *ex parte* and that no hearing, formal or otherwise, was held to test the accuracy of the evidence.

client[4]—all situations in which the risk of public suspicion is both clear and compelling. Moreover, where as here the risk of suspicion is not great, less intrusive methods, such as disciplinary proceedings, should be adequate to protect the public confidence in the bar.[5]

Against what the facts indicate is a fairly remote risk of public suspicion we must weigh the defendant's sixth amendment right to counsel of his choice. While I concede this right is not absolute, *e.g.*, *United States v. Kitchin*, 592 F.2d 900 (5th Cir. 1979), it nevertheless is so compelling that the Fifth Circuit previously has held that a criminal defendant must be given the opportunity to waive a conflict of interest and retain counsel of his choice in situations where disqualification might otherwise be appropriate. *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975) (potential conflict in attorney's representing co-

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[4]The majority opinion fails to explain that the government originally asserted four grounds of disqualification against the attorney, including a conflict with his prior representation of government witnesses and the intention to call him as a witness at trial. The trial court specifically rejected *all* of the proffered grounds for disqualification except the "appearance of impropriety" ground. The attorney, therefore, concededly is not a target of a government investigation, nor is it likely he will be called to testify against his client.

[5]In Florida, bar disciplinary proceedings are conducted by the state bar under the authority of the Florida Supreme Court. Fla.Const.Art. 5 § 15, Integration Rule for the Florida Bar Arts. X, XI.

fendant).[4] In my opinion, the "social interests" of enforcing the constitutional rights of the defendant far outweigh any risk of public suspicion of the integrity of the judicial process that is presented by the facts of this case. Moreover, if the meager evidence presented here supports the "drastic action" of disqualification and consequent limitation of the constitutional right to counsel of one's choice, I find it difficult to envision under what circumstances the social interests of an attorney's continued representation will outweigh the risk of suspicion presented by an asserted conflict.

Disqualification of counsel in a criminal case on the "appearance of impropriety" should be a remedy sparingly used, resorted to only when the facts of the case indicate a grave danger of the erosion of public confidence in the judicial system, thus transcending any interest the defendant has in retaining counsel of his choice.[5] Because this situation is not present here, I must dissent from the affirmance of disqualification.

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[4]Because the sole ground for disqualification is the "appearance of impropriety," this case differs from those in which a disqualification resulted from an asserted conflict of interest which was certain to occur but, because its scope was unclear or its precise nature not understandable by the defendant, the accused could not "knowingly and intelligently" waive the conflict. *E.g., United States v. Dolan*, 570 F.2d 1177, 1181 (3d Cir. 1978). Here there is no allegation or evidence that the conflict alleged could not be waived by Hobson.

[5]*Cf., Maxwell v. Superior Court*, 30 Cal.3d 606, 180 Cal.Rptr. 177, 639 P.2d 248, 50 U.S.L.W. 2469 (Feb. 16, 1982) (holding that a potential conflict between attorney and client created by the client's assigning to the attorney exclusive "publicity rights" in the subject matter of the representation could be waived and was not sufficient grounds for disqualification).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail to Michael Moore, Esq., Acting United States Attorney, P. O. Box 1308, Tallahassee, Florida 32302 this _____ day of July, 1982.

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No. 82-57

In the Supreme Court of the United States

OCTOBER TERM, 1982

RUSSELL HORWITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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No. 82-57

RUSSELL HOBSON, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the disqualification of one of his attorneys from representing him in a drug trafficking prosecution violated the Sixth Amendment by denying him counsel of his choice.

1. a. In September 1981, petitioner and certain co-defendants were charged in an indictment returned in the United States District Court for the Northern District of Florida with various offenses involving drug trafficking. Thereafter, the district court granted the government's motion to disqualify Clyde M. Taylor, Jr., one of petitioner's attorneys.

The district court's disqualification order was based upon the affidavits of two witnesses, Pat Robinson and Tom Alexander, who were expected to testify at petitioner's trial.[1] The affidavit of Robinson stated that, while he was

[1]We have been informed by the Assistant United States Attorney responsible for the case that Robinson and Alexander did subsequently testify at trial.

in the office of petitioner's attorney on another matter, he "discussed with [the attorney] about [the attorney] getting in touch with Tom Alexander for the purpose of getting me work unloading marijuana. [The attorney] indicated that he would contact Alexander" (Pet. App. 4; brackets in original). Alexander then came to the office of Taylor, the attorney. The affidavits of Robinson and Alexander further indicated that while they were in Taylor's office, they discussed the possibility that Robinson might assist in unloading marijuana from a Constellation airplane in the near future and that Taylor was in and out of his office during this time. Alexander stated that he was reasonably sure that Taylor had full knowledge of the context of the conversation and that the Constellation aircraft to which he and Robinson referred was that apprehended at the Panama City airport in February 1979. Petitioner was alleged to have been one of the co-conspirators in this unlawful importation of marijuana (*id.* at 4-5).

The district court observed that these affidavits, if true, showed Taylor's participation in the conspiracy and that the subject matter of the affidavits would be a matter of proof at trial (1/20/82 Order at 2-3). The court concluded that such evidence would create a reasonable possibility of an appearance of impropriety by Taylor. In addition, the court concluded that such evidence, even if ultimately false, could bring before the jury an issue of Taylor's credibility that might operate to petitioner's detriment. On this basis, and citing the requirement in Canon 9 of the Code of Professional Responsibility that a lawyer avoid even the appearance of impropriety, the court disqualified Taylor (1/20/82 Order at 3-4; Pet. App. 5).

b. In an opinion dated March 24, 1982, the court of appeals affirmed the disqualification order, concluding "[a]fter serious reflection on the circumstances of this case

* * * that the likelihood of public suspicion outweighs [petitioner's] interest in being represented by the attorney in question" (Pet. App. 10). The court observed that if testimony similar to that in the affidavits were offered, it would "portray [petitioner's] attorney as having engaged in thoroughly improper and unethical conduct and thus will impugn severely his integrity and credibility in the eyes of the jury" (*ibid.*). The court acknowledged that petitioner had indicated that he would be willing to waive any ethical problems in order to be represented by Taylor, but it concluded that this would not be an appropriate solution "because the ethical violation involves public perception of the lawyer and the legal system rather than some difficulty in the attorney's effective representation of [petitioner]" (Pet. App. 11). Judge Kravitch dissented, disagreeing with the balance struck by the majority between the likelihood of public suspicion and petitioner's interest in being represented by Taylor (*id.* at 13-16).

c. Petitioner's jury trial was not stayed pending appeal of the disqualification order, and petitioner has since been convicted of conspiracy to conduct and participate in the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(d) and 1963); conducting and participating in the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(c) and 1963); conspiracy to import marijuana (21 U.S.C. 960 and 963); importing marijuana (21 U.S.C. 952(a) and 960); conspiracy to possess marijuana with intent to distribute (21 U.S.C. 846); and possession of marijuana with intent to distribute (21 U.S.C. 841(a)). On April 28, 1982, petitioner was sentenced to a total of 35 years' imprisonment and fined a total of $110,000 on these counts and was sentenced to special parole terms of two years on two counts. Petitioner has taken an appeal from his conviction, but he has not yet filed his brief in the court of appeals.

2. a. Petitioner now requests this Court to review the March 24, 1982 decision of the court of appeals affirming the pretrial order disqualifying one of his attorneys, contending (Pet. 7-12) that the disqualification violated his Sixth Amendment rights by depriving him of the assistance of counsel of his choice. In our view, there is a substantial question whether the court of appeals even had jurisdiction under 28 U.S.C. 1291 of the appeal of the district court's order disqualifying counsel pursuant to the collateral order doctrine.[2] Moreover, if the court of appeals now affirms petitioner's conviction, he will be able to present the disqualification issue to this Court together with any other claims he may have in a petition for a writ of certiorari seeking review of the court of appeals' affirmance. If the court of appeals reverses his conviction under circumstances that would preclude a new trial, the disqualification issue will be moot. And, finally, if the court of appeals reverses the conviction and affords petitioner the right to a new trial, petitioner will be in the same position he occupied when the court of appeals affirmed the disqualification order in March of this year, before he was tried for the first time. He could file a petition for a writ of certiorari at that time seeking review of the court of appeals' affirmance of the disqualification order. Of course, if petitioner filed a certiorari petition under those circumstances, the disqualification issue would again be presented in an interlocutory posture, because he would not yet have been retried. The

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[2]See Brief for the United States in Opposition (at 9-15) in *Greger* v. *United States*, No. 81-1357, 1981 Term. The government did not challenge the jurisdiction of the court of appeals under 28 U.S.C. 1291 to review the order disqualifying the attorney, but the court of appeals held that the order was appealable (Pet. App. 5). The Ninth Circuit has held that such an order is not appealable. *United States* v. *Greger*, 657 F. 2d 1109 (9th Cir. 1981), petition for cert. pending, No. 81-1357.

Court accordingly might decline to consider the disqualification issue at that time in the exercise of its discretionary certiorari jurisdiction, choosing instead to await the outcome of the retrial and any subsequent appeal to determine whether certiorari is warranted on the merits of the disqualification issue.

3. In any event, the decision of the court of appeals is correct, does not conflict with any decision of this Court or another court of appeals, and raises no issue warranting review by this Court. Petitioner concedes (Pet. 7) that a defendant does not have an absolute right to counsel of his choice.[3] The only issue presented, then, is whether the court of appeals correctly held in the circumstances of this case that petitioner's interest in being represented by a particular lawyer was outweighed by the public interest in enforcement of ethical standards intended to ensure confidence in the integrity of the bar and the criminal justice system. In our view, the court of appeals clearly reached the correct result. This is not a case involving a vague "appearance of impropriety" about which there could be some disagreement regarding its effect on the public's perception of and confidence in the bar and the criminal justice system. The affidavits of Robinson and Alexander attested to facts establishing that petitioner's attorney not only had advance knowledge of a criminal transaction with which petitioner was charged, but also that he was a participant in a conspiracy with petitioner (1/20/82 Order at 2). We agree with the district court's observation that "any citizen, not a cynic, but any citizen would be suspicious of Taylor's representation of [petitioner]" in these circumstances (1/20/82 Order

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[3]See generally Brief for the United States as Amicus Curiae at 18-23, in *Morris* v. *Slappy*, No. 81-1095, 1981 Term.

at 3). Cf. *United States* v. *Salinas*, 618 F. 2d 1092 (5th Cir. 1980).[4]

The district court could not, of course, be certain whether the affidavits of Robinson and Alexander were true or false in their account of Taylor's knowledge or conduct, and, as the courts below acknowledged (1/20/82 Order at 3-4; Pet. App. 12 n.*), trial testimony by Robinson and Alexander to the same effect would have been subject to impeachment. But as the court of appeals pointed out (Pet. App. 12 n.*), the allegations, regardless of their truth or falsity, bring the attorney's integrity and credibility into question. The circumstance therefore might engender a public suspicion with regard to possible impropriety that could taint the integrity of the entire proceeding and the public's confidence in that integrity. The Sixth Amendment does not require a trial court to countenance such a situation and to ignore reasonable ethical rules of the legal profession designed to protect against this very eventuality. See, *e.g.*, Advisory Committee Note to Fed. R. Crim. P. 44(c), 77 F.R.D. 594, 602-603, quoting *United States* v. *Dolan*, 570 F. 2d 1177, 1183-1184 (3d Cir. 1978).

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[4]Petitioner contends (Pet. 9-10) that other cases involving disqualification on the basis of an appearance of impropriety have turned on whether it "appeared" that another ethical canon may have been violated. Even assuming that petitioner is correct that disqualification on the basis of an appearance of impropriety must be limited to such circumstances, the conduct of counsel described in the affidavits in this case creates an appearance of a violation of a number of provisions of the ABA Code of Professional Responsibility (1978). See Canon 1; DR 1-102(A)(3), (5) and (6); DR 7-102(A)(7) and (8).

It therefore is respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1982

DOJ-1982-09